

Before the  
**FEDERAL COMMUNICATIONS COMMISSION**  
Washington, DC 20554

In the Matter of	)	
	)	
Commission Seeks Comment on Disposition of	)	WT Docket No. 02-276
Down Payments and Pending Applications for	)	
License Won During Auction No. 35 for	)	
Spectrum Formerly Licensed to NextWave	)	
Personal Communications, Inc., NextWave	)	
Power Partners, Inc. and Urban Comm-North	)	
Carolina, Inc.	)	

To: The Commission

**COMMENTS OF DCC PCS, INC.**

DCC PCS, Inc. ("DCC"), a winning bidder in Auction 35, hereby submits its comments in response to the *Public Notice* in the above-captioned proceeding.<sup>1</sup> In the *Public Notice*, the Commission takes official notice of the status of the capital markets and other economic conditions affecting the telecommunications industry and seeks comment on different options for providing current Auction 35 applicants with the ability to retain or dismiss certain of their applications. For the reasons discussed below, DCC strongly supports adoption of a flexible program for applicants to submit requests for the voluntary dismissal of all or some of their existing Auction 35 obligations.

I. THE COMMISSION MUST MAKE NEW OPTIONS AVAILABLE FOR  
AUCTION WINNERS IN LIGHT OF CHANGED CIRCUMSTANCES SINCE  
AUCTION 35 CLOSED.

The Commission has appropriately recognized that there have been a sufficient number of significantly changed circumstances, beyond the control of both the bidders and the Commission, to warrant consideration of special relief for winning bidders. Auction strategies, valuations,

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<sup>1</sup> FCC 02-248 (rel. Sept. 12, 2002).

procedures and regulations that were developed at a very different time and under a very different set of assumptions as to the consummation of the Auction 35 results cannot be fairly applied ubiquitously to winning bids at this time.

Of course, the most obviously changed circumstance is that the Commission lacks the ability to grant Auction 35 licenses for the so-called NextWave spectrum. There can be little doubt that if the FCC had held an auction with only the speculation that the agency *might* succeed in repossessing the NextWave spectrum in the future, the results would have been significantly different from those obtained in Auction 35, when the FCC intended promptly to grant new licenses to the winning bidders. Yet that is essentially where the parties find themselves today – the Commission continues to enforce Auction 35 results on the speculation that the Commission *might be able to grant licenses sometime in the future*. This is fundamentally unfair.

Of no less import, the economic strength of the telecommunications sector, generally, and the wireless telecommunications sector, more specifically, is dramatically different today than when Auction 35 closed. Wireless carriers which reasonably expected strong growth have suffered significant erosion in their revenues and much slower increases in the number of subscribers, resulting in significantly lowered enterprise values for many industry players.<sup>2</sup> The winning bidders' inability to integrate the NextWave spectrum into existing systems to meet spectrum requirements for advanced services, coupled with the continued contingent obligation to purchase the spectrum, has further depressed investors' views of the entire sector.

Two fundamental objectives imposed on the Commission in implementing its auction

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<sup>2</sup> As noted by the Cellular Telecommunications and Internet Association ("CTIA") in its October 8, 2002 "Comments" in this proceeding, the market capitalization of the largest wireless service

authority are the “the development and rapid deployment of new technologies, products, and services” and “promoting economic opportunity and competition and ensuring that new and innovative technologies are readily accessible to the American people.”<sup>3</sup> DCC submits that these objectives can best be met by providing winning bidders with flexible alternatives for obtaining current relief from the unsettled Auction 35 results if the bidder so elects.

II. AUCTION 35 WINNING BIDDERS SHOULD BE ABLE TO PICK AND CHOOSE LICENSES FOR WHICH THEY DESIRE TO KEEP THEIR APPLICATIONS PENDING AND WHICH TO DISMISS.

DCC *strongly* supports the exercise of Commission discretion to allow Auction 35 winning bidders to opt out of their winning bids. Winning bidders should be given a reasonable opportunity to choose those applications that will remain pending (and thus subject to Auction 35 obligations) and those that will be dismissed, without any prejudice to the bidder’s participation in future auctions for the spectrum.<sup>4</sup>

There appears to be no downside for the Commission to allow the most flexible pick and choose option. While some applicants will opt out of substantially all of their winning bids, under this more flexible approach, it is also likely that the Commission will be able to obtain the Auction 35 results as to some number of the Auction 35 licenses. Such flexibility creates no material adverse impact on the Commission’s ability to grant licenses for this spectrum in the public interest, whether all of the winning bids are cancelled or only some applications are dismissed.

Using the most flexible approach would also be consistent with the FCC’s prior handling

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providers has dropped almost 75%, and nearly \$65 billion dollars of market capitalization has been lost in just the last ten months. *See* CTIA Comments at 2.

<sup>3</sup> 47 U.S.C. Section 309(j)(3)(A) and (B).

<sup>4</sup> *See Public Notice* at 4-5.

of defaulting C-block auction winners. When C-block licensees experienced difficulties in obtaining financing caused by unexpected economic changes in the sector and delayed processing of the C-block applications, the FCC offered a variety of revised financing options, including an option to surrender some or all licenses.<sup>5</sup> The current circumstances present an even stronger case for providing flexible relief for the winning bidders. In this case, the financial circumstances affect the entire industry and involve a significant additional factor outside the control of the winning bidders – the NextWave litigation which has impeded the FCC’s ability even to grant the licenses that were auctioned. Winning bidders here are not in default (or threatening default) on any FCC obligations, but rather find themselves the victims of a legal battle that they have little ability to resolve.<sup>6</sup> Accordingly, Auction 35 applicants clearly deserve the most flexible relief that can be fashioned.

III. THE COMMISSION MUST RECOGNIZE THE CURRENT SITUATION AS A “MUTUAL RESCISSION” OF OBLIGATIONS; DEFAULT PENALTIES AND DEBT FORGIVENESS ARE NOT APPROPRIATE TO THE INSTANT SITUATION.

Finally, DCC believes it is critical for the Commission to appropriately characterize its actions in order to avoid legal disputes as to their validity. In this regard, the *Public Notice* asks for comment on whether the Commission should refund some or all down payments, and/or bar participation in future auctions for licenses for which applications are dismissed.<sup>7</sup> The *Public*

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<sup>5</sup> *Amendment of the Commission’s Rules Regarding Installment Payment Financing For Personal Communications Services (PCS) Licenses*, WT Docket No. 97-82, *Second Report and Order and Further Notice of Proposed Rule Making*, 12 FCC Rcd 16,436, 16,439-40, 16,452-70 (1997), *recon. granted in part, Order on Reconsideration of the Second Report and Order*, 13 FCC Rcd 8345 (1998), *aff’d*, *US Airwaves, Inc. v. FCC*, 232 F.3d 227 (D.C. Cir. 2000).

<sup>6</sup> Indeed, as the Commission is painfully aware, a significant effort by the winning bidders to negotiate a settlement of the litigation among and between the affected parties failed for lack of Congressional action on necessary legislation.

<sup>7</sup> *Public Notice* at 5.

*Notice* also states that it would “waive its default rules for dismissed license applications and, subject to coordination with the Department of Justice pursuant to applicable federal claims collection standards, forgive the debt on them incurred at Auction No. 35.”<sup>8</sup> By these questions and statements, the Commission apparently believes that it must characterize these opt out opportunities as matters covered by its defaulting bidder rules, and as a forgiveness of debt obligations by the applicants.

DCC strongly disagrees with this characterization. The Commission’s decision to allow winning bidders to opt out of certain auction results, and the decision of a winning bidder to dismiss certain applications under an opt out program do not constitute any type of default. Rather, these decisions are appropriately characterized as a “mutual rescission of obligations” made by both parties -- in recognition, on the one hand, that the FCC is not able to deliver the licenses won at auction, and, on the other, that with the passage of time, the winning bids no longer appropriately reflect the value of the licenses. Indeed, the winning bidder is no more in default of an obligation to buy the licenses than the FCC is in default of its obligation to timely deliver the licenses for which the winning bidder is qualified.<sup>9</sup> This is a mutual decision of the parties. And since the licenses have never been awarded, *i.e.*, the obligation to pay for them has not matured, there is no debt to forgive, but merely a conditional obligation to pay that will no longer be enforced.

Questions concerning waiver of the default rules and sanctioning of applicants who obtain debt forgiveness are simply not appropriate to this situation. It is similarly inappropriate

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<sup>8</sup> *Id.*

<sup>9</sup> Since most of the Auction 35 applicants have already been granted some or all of the non-NextWave licenses for which they were the winning bidder, it is clear that such applicants are qualified to receive the NextWave licenses as well; the only reason they have not been awarded those licenses is that the FCC does not have the spectrum to award.

for the Commission to impose any future restriction on any applicant from acquiring any opt-out license at any point in the future, whether at re-auction or in the after-market. In a mutual rescission context, both parties are relieved of an obligation, and neither party should suffer any future consequences from such actions. Moreover, and consistent with the concept of mutual rescission, the FCC should certainly refund the remaining down payments associated with any applications that bidders choose to dismiss.<sup>10</sup>

DCC recognizes and shares the Commission's concern for maintaining auction integrity in its actions in this matter.<sup>11</sup> However, DCC believes that the integrity of the auction process can only be strengthened by the Commission's exercise of flexibility in recognizing the appropriateness of a mutual rescission of the auction results in the face of such changed circumstances. Holding the winning bidders to their original auction obligations, or attempting to impose default penalties or post-dismissal restrictions on applicants, would only harm, rather than advance, the integrity of the auction process.

A cornerstone of a successful and fair spectrum auction is certainty of performance. The Commission expects bidders to pay their winning bids on a timely basis after grant. And bidders must be able to expect the FCC to deliver licenses on a timely basis, *i.e.*, within a reasonable timeframe after the auction closes, in determining the value they will place on the licenses for which they are bidding.<sup>12</sup> If bidders are unable to rely on such a presumption, they will naturally participate in any spectrum auction with a high level of suspicion, and they will necessarily bid

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<sup>10</sup> There may be public policy reasons for the FCC to retain a minimum security deposit relating to any licenses for which an applicant opts in.

<sup>11</sup> See *Public Notice* at 3.

<sup>12</sup> In fact, Congress has required the Commission to ensure "the development and rapid deployment of new technologies, products, and services for the benefit of the public, including

with great reluctance to tie up capital resources beyond a reasonable timeframe. Holding Auction 35 bidders to the January 2001 results does not create confidence in the auction process, but rather demonstrates an inflexibility which discourages participation in future auctions.<sup>13</sup> While it cannot be denied that potential bidders were aware of the NextWave litigation contingency, it is unreasonable to suggest that when Auction 35 was conducted, the bidders – or the Commission -- were anticipating multiple years of delay before the auctioned licenses could be granted.

The Commission has often construed its auction authority to permit wide latitude in implementing its auctions, in accordance with the general powers found in Sections 4(i) and 303(r) of the Act, and in furtherance of the public interest objectives of Section 309(j),<sup>14</sup> and it should do so here. By providing Auction 35 winners the opportunity to opt out of some or all of their winning bids, bidders in future auctions can be confident that if the unanticipated passage of

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those residing in rural areas, without administrative or judicial delays.” 47 U.S.C. Section 309(j)(3)(A).

<sup>13</sup> Ironically, the most notable auction in which unanticipated delays arose was Auction 5, the initial C-block auction, and the result of significant processing delays was the extensive litigation at the Federal Bankruptcy, District, and Appeals Courts, which continues in the context of the bankruptcies of two of the largest bidders in that auction, GWI PCS, Inc. and NextWave Personal Communications, Inc. It is certainly clear now that the Commission’s inflexibility in dealing with these two licensees has significantly damaged the reputation of the auctions process, rather than enhancing confidence in it.

<sup>14</sup> See *Requests for Refunds of Down Payments Made In Auction No. 35, Order*, FCC 02-09 at para. 13 (rel. Mar. 27, 2002)(granting partial refunds of deposit payments); *Cellular Telecommunications Industry Association’s Request for Delay of the Auction of Licenses in the 747-762 and 777-792 MHz Bands, Scheduled for September 6, 2000 (Auction No. 31), Memorandum Opinion*, 15 FCC Rcd 17,406, 17,410-17,412 (2000)(postponing the start of Auction 31); *Amendment of Part 1 of the Commission’s Rules -- Competitive Bidding Procedures*, WT Docket No. 97-82, *Third Report and Order and Second Further Notice of Proposed Rule Making*, 13 FCC Rcd 374 (1997)(amending the general Part 1 competitive bidding procedures); *Amendment of the Commission’s Rules Regarding Installment Payment Financing For Personal Communications Services (PCS) Licenses*, WT Docket No. 97-82, *Second Report and Order and Further Notice of Proposed Rule Making*, 12 FCC Rcd 16,436, 16,438, 16,448, 16,455, 16,457-58, 16,462 (1997)(restructuring payment obligations for winning C-block bidders).

time and the introduction of circumstances that were not reasonably predicted when the auction was held warrant appropriate consideration of such relief, the Commission will be flexible enough in its implementation of the auction to provide it.

### **CONCLUSION**

The NextWave litigation remains an albatross on the neck of the Commission's auction performance. And the albatross now weighs heavily on the economic well-being of the wireless telecommunications industry. The Commission can best promote the public interest – including the public's interest in auction integrity – by providing Auction 35 winning bidders with maximum flexibility in choosing to remain or be relieved of their Auction 35 winning bids.

Respectfully submitted,

**DCC PCS, Inc.**

By: /s/ Ronald L. Ripley  
Ronald L. Ripley, Esq.  
14201 Wireless Way  
Oklahoma City, OK 73134  
(404) 236-5543

*Its Attorney*

Date: October 11, 2002